632B

Nos. 06-84, 06-100

IN THE

Supreme Court of the United States

SAFECO INSURANCE COMPANY OF AMERICA, *ET AL.*,
Petitioners,

v.

CHARLES BURR, *ET AL.*,
Respondents.

GEICO GENERAL INSURANCE COMPANY, *ET AL.*,
Petitioners,

v.

AJENE EDO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF FORD MOTOR COMPANY IN SUPPORT OF PETITIONERS

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BRIEF *AMICUS CURIAE* OF FORD MOTOR COMPANY IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST[1]

Ford Motor Company ("Ford") assembles and distributes

[1] Pursuant to this Court's Rule 37(a), blanket letters of consent from the parties were filed with the Clerk on September 28, 2006 and September 29, 2006. Pursuant to Rule 37.6, Ford states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than Ford made a monetary contribution to the preparation or submission of this brief.

motor vehicles nationwide. One of Ford's wholly-owned subsidiaries, Ford Motor Credit Company ("Ford Credit"), offers a wide variety of automotive financing products to and through automotive dealers nationwide. As a provider of financing products, Ford Credit is subject to litigation based on the occasionally ambiguous terms of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA"), and has a direct interest in ensuring that it is not subject to statutory or punitive damages for good faith, objectively reasonable interpretations of the provisions of that act. *See, e.g., Carter* v. *Atchley Ford, Inc.*, No. 8:01CV151, 2002 WL 802682 (D. Neb. 2002) (seeking punitive damages under FCRA).

Ford and Ford Credit are also routinely subject to other litigation under state and federal law in which the plaintiff seeks statutory or punitive damages on the basis that they have allegedly acted in conscious or reckless disregard of the plaintiffs' rights, the same standard that the Ninth Circuit adopted in this case for awarding statutory and punitive damages under FCRA. *See, e.g., Buell-Wilson* v. *Ford Motor Co.*, 141 Cal. App. 4th 525 (2006) (punitive damages sought for "conscious disregard" of safety in designing motor vehicle); *In re Ratliff*, 318 B.R. 579, 583 (Bankr. E.D. Okla. 2004) (punitive damages sought for repossessing secured vehicle in "reckless disregard" of federally protected right to automatic bankruptcy stay). In many of these cases, punitive damages are sought, and occasionally awarded, even though Ford or Ford Credit's conduct was objectively reasonable, *i.e.*, reasonable people could conclude that their conduct was lawful. In *Buell-Wilson*, for example, the California courts have upheld an award of punitive damages against Ford based on alleged stability defects in the Ford Explorer even though the National Highway Traffic Safety Administration has repeatedly considered and rejected the theories asserted by the plaintiffs, and even though, prior to the *Buell-Wilson* trial, Ford had never lost an Explorer

rollover case at trial and at least 11 other juries had returned defense verdicts in such cases.

As explained below, due process precludes punishment for objectively reasonable conduct that reasonable people could conclude was lawful. For this reason, it should preclude punishment in this case for an interpretation of FCRA that the district court found was correct or that has been endorsed by the Federal Trade Commission. Ford has a substantial interest in ensuring that this Court's decision takes account of the constitutional limitations that apply, not just in this case, but in all other cases in which punitive damages are sought.

SUMMARY OF ARGUMENT

As the petitions explain, the Ninth Circuit interpreted the term "willful" as used in 15 U.S.C. § 1681n to permit the imposition of punitive damages based solely on "negligence, gross negligence, or a complete good faith but incorrect interpretation of the law, and upon conduct that is objectively reasonable as a matter of law." Geico Pet. *i.; see also* Safeco Pet. 2. So understood, the Ninth Circuit's opinion would permit punitive damages to be awarded under circumstances in which reasonable people could conclude—indeed, like the district court and the Federal Trade Commission, *have* concluded—that the defendant's interpretation of its obligations under FCRA was correct.

Such an interpretation of the statute raises serious due process concerns by permitting jury-imposed punishment without providing fair notice to defendants of what they were required to do to avoid such punishment. At least a century's worth of precedent establishes that a statute is unconstitutionally vague if applied to punish—civilly or criminally—conduct that is "objectively reasonable," *i.e.*, conduct that reasonable people could conclude was lawful.

In *Screws* v. *United States*, 325 U.S. 91 (1945), this Court confronted the same constitutional issue and interpreted the same word, "willful," in a way that precluded punishment for conduct that was objectively reasonable. To avoid the constitutional problem in this case, this Court should interpret "willful" in the same way and require proof that the defendant knew it was violating a provision of FCRA that was sufficiently definite that its meaning at the time of the defendant's conduct was not subject to reasonable debate.

ARGUMENT

IF APPLIED TO PUNISH OBJECTIVELY REASONABLE CONDUCT, § 1681n WOULD VIOLATE THE FAIR NOTICE REQUIREMENTS OF DUE PROCESS

As Petitioners argue, the Ninth Circuit interpreted the term "willful" in 15 U.S.C. § 1681n to permit the imposition of punitive damages based solely on "negligence, gross negligence, or a completely good faith but incorrect interpretation of the law, and upon conduct that is objectively reasonable as a matter of law." Geico Pet. *i.*; *see also* Safeco Pet. 2. That interpretation would render the statute unconstitutionally vague under the Due Process Clause of the Fifth Amendment. The Court should avoid that constitutional problem by adopting an interpretation of willful that precludes punishment for objectively reasonable conduct, just as it did in *Screws* v. *United States*, 325 U.S. 91 (1945).

1. This Court has repeatedly held that vagueness in a criminal or quasi-criminal statute violates due process if it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." *City of Chicago* v. *Morales*, 527 U.S. 41, 56 (1999); *accord, e.g., Hill* v. *Colorado*, 530 U.S. 703, 732 (2000). "[B]ecause we assume that man is free to steer between lawful and unlawful

conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *accord*, *Morales*, 527 U.S. at 56 (fair notice principle serves the purpose of "provid[ing] the kind of notice that will enable ordinary people to understand what conduct [a law] prohibits"). Punishment therefore may not be predicated on a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997).

This Court has never limited vagueness doctrine to criminal penalties; on the contrary, it has consistently applied the doctrine to civil statutes that are punitive in nature. *See, e.g., Village of Hoffman Estates* v. *Flipside*, 455 U.S. 489, 499 (1982) (employing strict vagueness scrutiny for statute that imposed quasi-criminal penalties); *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402 (1966) ("[T]his state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague"); *Champlin Ref. Co.* v. *Corp. Comm'n*, 286 U.S. 210, 241 (1932) (holding penalty statute unconstitutionally vague where it was designed not to remedy a violation but "to inflict punishment."); *A.B. Small Co.* v. *American Sugar Ref. Co.*, 267 U.S. 233 (1925) (holding statute unconstitutionally vague in civil case); *Sw. Tel. & Tel. Co.* v. *Danaher*, 238 U.S. 482 (1915)($6,300 civil penalty violated due process). Nor is the doctrine limited to statutory civil punishments. Indeed, with specific reference to punitive damages, this Court recently observed that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice * * * of the conduct that will subject him to punishment." *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 417 (2003) (quoting *BMW of N. Am.* v. *Gore*, 517

U.S. 559, 574 (1996)).[2]

2. In *Lanier*, this Court expressly recognized that the due process vagueness standard, which protects all citizens from punishment based on vaguely defined offenses, is functionally identical to the qualified immunity standard, which protects public officials from civil liability based on legal obligations that are not "clearly established." 520 U.S. at 270-71. As the Court observed, the qualified immunity test for public officers is "simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *Id.* And this Court's opinions establish beyond any doubt that officials are entitled to qualified immunity as long as their conduct is "objectively reasonable"—*i.e.*, as long as reasonable officials could conclude that the conduct at issue was lawful. *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (immunity available if officers act in "objectively reasonable manner"; "Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that [the conduct was lawful"); *accord, e.g., Hunter* v. *Bryant*, 502 U.S. 224, 227 (1991) (under "settled law," officers are entitled to immunity "if a reasonable officer could have believed" that his or her conduct was lawful); *Anderson* v. *Creighton*, 483 U.S. 635, 641 (1987) ("The

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[2] The "actual damages" allowed by 15 U.S.C. § 1681n(a)(1)(A)—a minimum of $100 regardless of actual losses—are unrelated to the amount of any actual damages suffered by a plaintiff. Thus, as noted by *amici* Farmers Insurance Co., these statutory damages are punitive in nature and subject to the same constitutional limitations as punitive damages. *Amicus* Br. of Farmers Ins. Co. of Or., *et al.*, at 12-13 n.7, citing *United States* v. *Halper*, 490 U.S. 435, 448 (1989), *overruled on other grounds by Hudson* v. *United States*, 522 U.S. 93 (1997), and *Fitzgerald Publ'g Co.* v. *Baylor Publ'g Co.*, 807 F.2d 1110, 1117 (2d Cir. 1986).

relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's [conduct] to be lawful."). Accordingly, "if officers of reasonable competence could disagree on [the matter at] issue, immunity should be recognized." *Malley*, 475 U.S. at 341.

3. At least a century of precedent supports this Court's conclusion in *Lanier* that the due process vagueness standard likewise precludes punishment where reasonable people acting in good faith can disagree on whether the conduct is lawful. In *United States* v. *Capital Traction Co.*, 34 App. D.C. 592, 592 (1910), for example, a statute required every street railroad company to give passage to all persons desirous of using the railway cars "without crowding said cars." The defendant railroad company was charged with overcrowding its cars. Stating that "the dividing line between what is lawful and unlawful cannot be left to conjecture," the court held that the statutory prohibition of "crowded" railway cars was too indefinite and uncertain to support an indictment. *Id.* at 594.

> What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. What may be regarded as grounds for acquittal by one court may be held sufficient to sustain a conviction in another. The principle of uniformity, one of the fundamental elements essential in determining the validity of criminal statutes, is wholly lacking.

Id. at 596.[3]

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[3] Even before this Court began to address vagueness issues, lower courts had reached a consensus that statutes could not constitutionally be applied to impose quasi-criminal punishment where reasonable people could reach different conclusions about whether the conduct was

Sixteen years later, in *Connally* v. *General Construction Co.*, 269 U.S. 385 (1926), this Court adopted the *Capital Traction* language as its own. The Oklahoma statute at issue in *Connally* imposed a fine and potential imprisonment for certain employers who failed to pay employees at least "'the current rate of per diem wages in the locality where the work is performed.'" 269 U.S. at 388. Quoting from *Capital Traction*, this Court observed that the "dividing line between what is lawful and unlawful cannot be left to conjecture," that a penal statute "must be so clearly expressed that the ordinary citizen can choose, in advance, what course it is lawful for him to pursue," that a "citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions," and that penal statutes "should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another." *Id.* at 393.

It was in this context that this Court in *Connally* adopted the modern standard for evaluating vagueness claims on which it later relied in *Lanier*: "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally*, 269 U.S. at 391.

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unlawful. *See, e.g., Louisville & Nashville R.R. Co.* v. *Railroad Comm'n*, 19 F. 679, 691 (C.C.M.D. Tenn. 1884) ("quasi criminal" penalties could not be imposed for charging "unjust" and "unreasonable" rates because one jury might find that the rates charged were unjust or unreasonable, while another jury, on the same facts, might find to the contrary, thereby "making the guilt or innocence of the accused dependent upon the finding of the jury, and not upon a construction of the act."); *Hewitt* v. *State Bd. of Med. Examiners*, 84 P. 39, 41 (Cal. 1906) (revocation of medical license for "grossly improbable statements" unconstitutional because "the members of one board might conclude that it contained 'grossly improbable statements,' while another board might reach an entirely opposite conclusion.").

Noting the ambiguity of both "current rate of wages" and "locality" in the statute, the Court concluded that the statute at issue was unconstitutionally vague because "the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries." *Id.* at 395.

4. Other decisions, both before and after *Connally,* have held statutes unconstitutional where liability depended on the "probably varying impressions" of courts and juries, *i.e.*, when such statutes were applied to punish defendants under circumstances where reasonable people (and, therefore reasonable courts and juries) could disagree about whether their conduct was lawful. *See, e.g. Colautti* v. *Franklin*, 439 U.S. 379, 401 (1979) (punishment improper where "experts can – and do – disagree"); *Southwestern Telegraph & Telephone Co.* v. *Danaher*, 238 U.S. 482 (1915). In *Danaher,* for example, an Arkansas statute required telephone companies to provide service to all applicants, subject to such "reasonable regulations" as the telephone company should establish. The defendant telephone company in *Danaher* had adopted a regulation under which it would not furnish service to patrons in arrears for past service and, further, would not provide to such patrons the discount normally allowed for paying in advance. The Arkansas Supreme Court found that the telephone company's regulation was unreasonable and that it had therefore violated the statute, and it affirmed a penalty of $6,300.

This Court held that the $6,300 penalty "was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law." 232 U.S. at 491. The Court held that the penalty violated the "fundamental principles of justice" embraced by the due process clause because the defendant was justified in believing it was

reasonable, even if it was foreseeable that a court *might* hold the regulation unreasonable:

> If it be assumed that the state legislature could have declared such a regulation unreasonable, the fact remains that it did not do so, but left the matter where the company was well justified in regarding the regulation as reasonable and in acting on that belief. * * * Some regulation establishing a mode of inducing prompt payment of the monthly rentals was necessary. * * * The protection of its own revenues and justice to its paying patrons required that something be done. It acted by adopting the regulation and then impartially enforcing it. There was no mode of judicially testing the regulation's reasonableness in advance of acting under it, and, as we have seen, it had the support of repeated adjudications in other jurisdictions.

Id. at 490-91.

5. In short, numerous decisions of this Court over the last century, in several different contexts, all establish the fundamental principle that the "fair notice" required to accord due process prohibits punishment for conduct that reasonable people could conclude was lawful—conduct which, in the qualified immunity cases, the Court has called "objectively reasonable."[4]

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[4] The term "objectively reasonable" is perhaps unfortunate, because it suggests that there is some objective method—apart from the verdict of a jury or the judgment of a court—by which to definitively decide whether conduct is reasonable, creating the apparent paradox that conduct found by a court or jury to be "unreasonable" (or worse) can nevertheless be "objectively reasonable." *See Anderson* v. *Creighton*, 483 U.S. 635, 643 (1987). As this Court recognized in *Anderson*, however, the paradox is purely semantic in nature and can be eliminated by simply changing the words used to describe the relevant concept. *Id.* And there is nothing at all paradoxical about the concept: there are many

The Court has likewise interpreted the very word at issue in this case—"willful"—consistently with the above precedents in order to avoid a constitutional vagueness problem. In *Screws* v. *United States*, 325 U.S. 91 (1945), three law enforcement officers were charged with "willfully" depriving a prisoner of his constitutional rights in violation of the precursor to 18 U.S.C. § 242. Concerned about the constitutional implications of interpreting "willfully" in a way that would permit an officer to be punished for intentionally doing "an act which some court later holds deprives a person of due process of law," this Court interpreted "willfully" to require proof that the defendants had the "specific intent to deprive a person of a federal right made definite by decision or other rule of law." *Screws*, 325 U.S. at 97, 103.

This case can and should be resolved in the same way as *Screws*. Here, as in *Screws*, an unduly broad interpretation of "willful" creates the potential of unconstitutionally punishing defendants for an objectively reasonable interpretation of the law that is later rejected by the courts. Here, as in *Screws*, this constitutional problem can be eliminated by interpreting the statute to require proof that the defendant knew it was violating a provision of FCRA that is sufficiently definite that its meaning at the time of the defendant's conduct was not subject to reasonable debate.

As in the qualified immunity cases, the objective component of the standard adopted in *Screws* "protects 'all but the plainly incompetent or those who knowingly violate the

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circumstances where reasonable people, courts and juries, forced to decide whether conduct is "reasonable," can be expected to reach different conclusions, such that conduct found by some people to be unreasonable might be found by others to be reasonable. The fact that reasonable people might disagree on what constitutes negligence, for example, explains why judgment as a matter of law on negligence issues is rarely appropriate. *See, e.g., Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (summary judgment proper only if "a reasonable jury could [not] return a verdict for the nonmoving party").

law.'" *Anderson*, 483 U.S. at 638 (quoting *Malley*, 475 U.S. at 341). And the subjective component eliminates the possibility of punishment for mere incompetence. Even the objective component alone, applied—as due process requires—to punitive damages as it has been applied in so many other contexts over the last century, has the potential to substantially reduce the "acute danger of arbitrary deprivation of property" from the random imposition of punitive damages for actions about which reasonable people can disagree. *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 417 (2003) (quoting *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994)). Applied in this case, it prohibits punishing Petitioners for judgments about the meaning of FCRA that are consistent with those made by the district court and the Federal Trade Commission.

CONCLUSION

To the extent that the Ninth Circuit interpreted FCRA to permit statutory and punitive damages to be awarded even though reasonable people—including the district court and the Federal Trade Commission—agreed or could have agreed with the defendants' interpretations of their obligations under FCRA, that interpretation violates the due process clause of the United States Constitution. This Court should reverse.

Respectfully submitted,

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